Supreme Court, U. S.
FILED
OCT 13 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-470

NATHAN PORTNER,

Petitioner,

vs.

COMMUNITY STATE BANK AND TRUST COMPANY, a New Jersey Corporation; KARL ASCH, former Union County Prosecutor; HOWARD FRANKEL; MICHAEL J. MITZNER; J. MICHAEL BREEN; GLEN OWEN; THOMAS J. BADER, also known as T. J. BADER; PEGGY FITZ; LEO KAPLOWITZ; LLOYD HARRIS; ARTHUR R. CROUCHER; JOHN C. GIORDANO, JR.; SEYMOUR GOLDBERG; THEODORE LEY; JOSEPH RESNICK; FRED ROTHSCHILD; SANDFORD H. SALZ; MAX SLADOWKY; and BERNARD ZIENTS,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SILLS, BECK, CUMMIS, RADIN & TISCHMAN, P.A.,
Attorneys for Respondents,
33 Washington Street,
Newark, New Jersey 07102.
(201) 643-3232

MORTON S. BUNIS,
Of Counsel.

BOGDA M. BLEKICKI,
On the Brief.

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

TABLE OF CONTENTS

	PAGE
STATUTORY PROVISIONS INVOLVED	2
COUNTER-STATEMENT OF THE CASE	6
REASONS FOR DENYING CERTIORARI	9
Point I—Writ of certiorari should be denied because the decision below is correct, there is no conflict between the circuits and the petitioner's claims raise purely hypothetical questions within the context of this case	9
Point II—A trial court's dismissal of a Complaint pursuant to Rule 12(b)(6) has long been approved by this Court and raises no exceptional issue for disposition	14
CONCLUSION	15

Cases Cited

Atkins v. Lanning, 556 F.2d 485 (10th Cir. 1977)	12
Austin v. Manlin, 433 F. Supp. 648 (E.D. Pa. 1977)	10
Briggs v. Goodwin, 569 F.2d 10 (D.C. Cir. 1977), cert. denied (1978)	12
Bruce v. Wade, 537 F.2d 850 (5th Cir. 1976)	12
Cambist Films Inc. v. Duggan, 475 F.2d 887 (3d Cir. 1973)	9
Clark v. Lutcher, 436 F. Supp. 1266, motion for dismissal denied, 415 (M.D. Pa. 1977)	10
Daniels v. Kieser, 446 F. Supp. 1160 (N.D. Ill. 1978)	9, 10

PAGE

Helstoski v. Goldstein, 552 F.2d 564 (3rd Cir. 1977) 13, 14

Imbler v. Pachtman, 424 U.S. 409 (1976) 9-13, 15

Littleton v. Berbling, 468 F.2d 389 (7th Cir. 1972), rev'd on other grounds, 414 U.S. 514 (1972) 9

Lofland v. Meyers, 442 F. Supp. 955 (S.D.N.Y. 1977) 10

McCray v. Maryland, 456 F.2d 1 (4th Cir. 1972) 9

Muskrat v. United States, 219 U.S. 346 (1911) 14

Robischaud v. Ronan, 351 F.2d 533 (9th Cir. 1965) 9

Walker v. Cahalan, 542 F.2d 681 (6th Cir. 1976) 13

Statutes Cited

42 U.S.C. §1983 .....2, 7, 8

New Jersey Statute 2A:85-1 ..... 2, 6

New Jersey Statute 2A:85-14 .....2, 6, 8

New Jersey Statute 2A:91-1 .....3, 6, 8

New Jersey Statute 2A:156-4(b) 3, 7

New Jersey Statute 2A:170-88 ..... 3, 6

Rules Cited

Rules of the Supreme Court of the United States:

Rule 19 9

Federal Rules of Civil Procedure:

Rule 12(b) 5, 7, 8, 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 78-470

NATHAN PORTNER,

Petitioner,

vs.

COMMUNITY STATE BANK AND TRUST COMPANY, a New Jersey Corporation; KARL ASCH, former Union County Prosecutor; HOWARD FRANKEL; MICHAEL J. MITZNER; J. MICHAEL BREEN; GLEN OWEN; THOMAS J. BADER, also known as T. J. BADER; PEGGY FITZ; LEO KAPLOWITZ; LLOYD HARRIS; ARTHUR R. CROUCHER; JOHN C. GIORDANO, JR.; SEYMOUR GOLDBERG; THEODORE LEY; JOSEPH RESNICK; FRED ROTHSCHILD; SANDFORD H. SALZ; MAX SLADOWKY; and BERNARD ZIENTS,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Statutory Provisions Involved

United States Code, Title 42:

Section 1983. Civil Action for Deprivation of Rights.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress."

New Jersey Statute, Title 2A:

Section 85-1. Offenses Indictable at Common Law and Not Otherwise Covered, Punishable as Misdemeanors.

"Assaults, batteries, false imprisonments, affrays, riots, routs, unlawful assemblies, nuisances, cheats, deceits, and all other offenses of an indictable nature at common law, and not otherwise expressly provided for by statute, are misdemeanors."

Section 85-14. Aiders and Abettors: Principals.

"Any person who aids, abets, counsels, commands, induces or procures another to commit a crime is punishable as a principal.

Any person who wilfully causes another to commit a crime is punishable as a principal."

Section 91-1. Bank Officials, Etc., Asking or Receiving Bribes for Undue Fees.

"Any officer, director, employee, agent or attorney of a bank, trust company, savings bank, building and loan association, savings and loan association or credit union who, directly or indirectly, asks for, demands, exacts, requires, receives or accepts, for his personal use, benefit or advantage, any money, or any promissory note, bill of exchange, check or other evidence of debt, or any security, promise, contract, covenant, agreement or obligation, express or implied, for the payment, delivery, alienation or transfer of any money, property or other thing, or for the performance or rendering of any act or service, as a bribe, present, reward, inducement, commission or fee for loaning any funds of or giving any credit on behalf of such bank, trust company, savings bank, building and loan association, savings and loan association or credit union, or for recommending, approving, voting for or consenting to the making of any loan or the giving of any credit by such bank, trust company, savings bank, building and loan association, savings and loan association or credit union, is guilty of misdemeanor."

Section 156A-4b. Exceptions.

It shall not be unlawful under this act for:

". . . b. A person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception;"

Section 170-88. Corruption of Agents, Employees or Servants; Corporate Agents Punishable Individually.

"Any person who gives, offers or promises any gift or gratuity to any employee without the knowledge and consent of his employer, and with intent to influence his action with relation to his employer's business, and any employee who, without the knowledge and consent of his employer, requests or accepts any gift or gratuity, or any promise to make a gift or to do any act beneficial to himself, under an agreement or understanding that he shall act in any particular manner to his employer's business, is a disorderly person. Any employee who, being authorized to procure materials, supplies or other articles, either by purchase or contract, or to employ service or labor for his employer, receives directly or indirectly for himself or for another, a commission, discount or bonus from the person who makes such sale or contract or furnishes such materials, supplies or other articles, or from a person who renders such service or labor, and any person who gives or offers such employee such commission, discount or bonus, are each of them a disorderly person.

If a corporation, partnership or other organization is guilty of a violation of this section, the persons through whom it acts are each of them a disorderly person.

In this section the term 'employee' includes any agent, employee or servant, and the term 'employer' includes any principal, employer or master."

F.R.C.P. 12(b):

"Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Counter-Statement of the Case

In or about May, 1974, petitioner Nathan Portner offered to respondent Peggy Fitz, an employee of respondent Community State Bank, a bribe in exchange for a confidential loan document. The Bank, thereupon, notified respondent Howard Frankel, Captain of the County Detectives in the office of the Union County Prosecutor, respondent Karl Asch, of the proposed bribe. In response, Frankel and other detectives in the Prosecutor's office sought further evidence to support the complaint by the Bank and arrested Nathan Portner and his son, Steven Portner, when the latter arrived at the Bank to receive the confidential bank document and thereafter gave it to Nathan Portner. No formal criminal Complaint was filed against Steven Portner.. A Complaint was filed against the petitioner Nathan Portner charging him with the violation of N.J.S. 2A:91-1 and N.J.S. 2A:85-14 in that petitioner offered and promised to pay to Peggy Fitz, an employee of the Bank, the sum of $500 for a copy of a confidential loan document.[1]

When the Union County Grand Jury failed to return a "true bill" against Nathan Portner and the Union County

[1] Contrary to what petitioner states in his Statement of the Case, petitioner Nathan Portner could have legitimately been charged under N.J.S. 2A:85-14 as one who aids, abets, or induces another to commit a crime in this case—N.J.S. 2A:91-1—the proffer of a proposed bribe to be received by a bank employee for the specific performance of her action in releasing a confidential loan document. Additionally, the statutes of New Jersey contain a general provision, N.J.S. 2A:85-1, were no specific statute to be applicable, making all cheats and deceits and other offenses which were indictable at common law misdemeanors under New Jersey law. Finally, the alleged activity of petitioner Nathan Portner involving the attempted corruption of employees has been clearly branded as illegal by N.J.S. 2A:170-88.

Assignment Judge dismissed the Complaint, the instant suit for damages under 42 U.S.C. § 1983 was instituted by the petitioner Nathan Portner.

Although the scenario which petitioner sets forth in his Statement of the Case may be interesting, it does not reflect the state of the pleadings or the record at the time dismissal of the Complaint pursuant to F.R.C.P. 12(b)(6) was granted to the respondents.

Petitioner, using the vehicle of the Statement of the Case in his Petition for a Writ of Certiorari, now seeks to supplement, pad or otherwise augment the record with certain alleged facts and several appendices (App. A through E of Petition, pp. 1a-8a) which were neither in the pleadings nor in the record before the District Court nor before the Third Circuit Court of Appeals. Such a clear violation of the rules of appellate procedure by the petitioner should not be countenanced by this Court.

At the time of the dismissal of the within Complaint, the only "facts" before the Court were those alleged in petitioner's Complaint (App. F of Petition, p. 9a). Petitioner alleged therein that respondent Bank and several bank employees conspired with respondent Frankel to entrap petitioner and to unlawfully record a conversation between him and respondent Fitz[2] for the purpose of showing that petitioner attempted to pay an illegal gratuity to respondent Fitz. Petitioner charges respondents Frankel, Breen and Owen, employees of the prosecutor's office, with illegal arrest, assault and battery and

[2] The Complaint on its face, clearly establishes that the recording of the conversation between petitioner and the respondent Fitz was made with the permission and consent of the respondent Fitz, one of the parties to the conversation and thus was not unlawful under New Jersey law. N.J.S. 2A:156A-4(b).

unlawful detention. He further alleges that respondents Mitzner and Frankel attempted to intimidate him into entering a guilty plea to a disorderly persons violation; otherwise they would charge him with the commission of a high "misdemeanor." He alleges that when he refused to enter a guilty plea he was charged with violations of N.J.S. 2A:91-1, 2A:85-14 which Complaint was dismissed after the Grand Jury failed to return a "true bill" against him. In sum, petitioner alleges that all the respondents conspired to violate his civil rights as protected by 42 U.S.C. § 1983.

On motion by respondents Bank, its officers and employees, the Honorable Frederick B. Lacey dismissed all of petitioner's causes of action except for the assault and battery count against Frankel, Breen and Owen.[3] He found that the witihn Complaint failed to state a cause of action as required by Fed. R. Civ. P. 12(b) because the allegations asserted in the Complaint constituted a quasi-judicial function of the prosecutor's office and therefor the respondents who were employed by said office were absolutely immune from liability under 42 U.S.C. § 1983. He further found that since the prosecutor and his employees were clothed with immunity, the Complaint against the respondent Bank and its officers and employees, as "private persons" could not be maintained because "they were not conspiring with persons acting under color of state law against whom a valid claim could be stated."

An appeal was taken by petitioner to the Third Circuit Court of Appeals and after hearing extensive argument, the Court affirmed the decision of Judge Lacey by the entry of a judgment order (App. L of Petition, p. 30a).

[3] This was petitioner's most heinous charge and said charge was dismissed at the trial of the action when petitioner admitted before the Court that he could not sustain the charge by a preponderance of the evidence. (App. J of Petition, p. 26a).

REASONS FOR DENYING CERTIORARI

POINT I

Writ of certiorari should be denied because the decision below is correct. There is no conflict between the circuits and the petitioner's claims raise purely hypothetical questions within the context of this case.

Petitioner's application is divided into four separate points which appear to present several reasons for granting certiorari. The first three points raised by petitioner are a contention that this Court should clarify its decision in *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), with respect to the immunity status of a prosecuting attorney and his staff. Respondents submit first, that clarification is not needed, and secondly, that if it may be needed, it will not be furthered by this case. Consequently, petitioner's present application is without merit. Respondents will answer in two points.

Petitioner, mouthing the wording of Rule 19, suggests that the opinion of the Court of Appeals for the Third Circuit in this case has created a conflict among the circuit courts. The cited cases, however, do not support the assertion. Any conceivable conflict must be one over the import and scope of the prosecutorial immunity settled by *Imbler, supra*. Cases which precede that precedent necessarily cannot be involved in that process. *Camlist Films* v. *Duggan*, 475 F.2d 887 (3d Cir. 1973); *McCray* v. *Maryland*, 456 F.2d 1 (4th Cir. 1972); *Littleton* v. *Berbling*, 468 F.2d 389 (7th Cir. 1972), *rev'd on other grounds*, 414 U.S. 514 (1972); *Robichaud* v. *Ronan*, 351 F.2d 533 (9th Cir. 1965). Citation to those cases, hence, is immaterial. Similarly, actions of district courts do not rise to the level of an opinion by a coordinate court. *Daniels* v. *Kieser* 446 F. Supp. 1160

(N.D. Ill. 1978); *Lofland* v. *Meyers,* 442 F. Supp. 955 (S.D.N.Y. 1977); *Clark* v. *Lutcher,* 436 F. Supp. 1266, *motion for dismissal denied,* 415 (M.D. Pa. 1977); *Austin* v. *Manlin,* 433 F. Supp. 648 (E.D. Pa. 1977). Conflict, if any, between the aforesaid cases and the Third Circuit Court of Appeals decision in this case alone do not justify the granting of certiorari, for it is the duty of the courts of appeals to maintain uniformity within their respective circuits and to supervise the decisions of the various district courts.

The decision of the Third Circuit Court of Appeals in this case is clearly correct and completely in line with *Imbler, supra,* and the decisions of the coordinate courts in the other circuits following the precedent in *Imbler.*

The Third Circuit Court of Appeals affirmed the decisions of Judge Lacey determining that all the actions of the Office of the Prosecutor in wiretapping the conversation, arresting, transporting, charging and filing the Complaint against petitioner were each an "'integral part of the judicial process.'" (App. H of Petition, p. 22a). Clearly the aim of all these actions was to further the quasi-judicial function of the prosecutor.

Under the circumstances of this case, all these actions are far from being purely investigatory simply because they were performed prior to the execution of any written complaint against the plaintiff. There is no dispute that the Union County Prosecutor's office received a complaint from a citizen, the respondent Bank, that petitioner had offered the payment of a bribe to respondent Peggy Fitz, an employee of said Bank, to provide petitioner with certain confidential documents in violation of New Jersey law. As far as the Prosecutor's office was concerned, a crime may well have been already committed by petitioner. At

that point, if the testimony of the Bank was credible, there was sufficient evidence of a crime to arrest petitioner. Therefore, any subsequent actions taken by the respondents, as employees of the Prosecutor's office, were integrally related to the prosecutor's decision to gather corroborative evidence of the crime for the reasonably contemplated future criminal prosecution of petitioner. Clearly, petitioner's attempt to characterize these actions as merely a general fishing expedition for possible criminal violations with no concrete purpose or specific focus of using the results in future proceedings against a specific person is without foundation.

This Court in *Imbler, supra,* recognized the need to extend the scope of quasi-judicial immunity to certain prosecutorial investigation similar to the instant matter when it stated:

> We recognize that the duties of the *Prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom.* A prosecuting attorney is required, constantly, *in the course of his duty as such,* to make decisions on a wide variety of sensitive issues. These include questions of whether to present a case to a grand jury, whether to file an information, whether and when to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present. *Preparation, both for the initiation of the criminal process and for trial, may require the obtaining, reviewing, and evaluating of evidence.* 420 U.S. at 431 n. 33. (Emphasis added).

Thus, this Court in *Imbler, supra,* suggested that such acts as in the instant case which are clearly associated with and preliminary to the obtaining of evidence in

preparation for the initiation of the criminal process against the petitioner are quasi-judicial functions of the office of the prosecutor and thus absolutely immunized.

The various courts of appeals have uniformly applied and followed this precedent. In *Atkins* v. *Lanning,* 556 F.2d 485, 488 (10th Cir. 1977), the Court held that the district attorney and his investigators were absolutely immune because their part in the alleged wrongful arrest and imprisonment of plaintiff was

> ". . . that of preparing and presenting a case, or in other words, those judicial functions for which absolute immunity is granted. *Apton* v. *Wilson,* 165 U.S. App. D.C. 22, 506 F.2d 83 (1974). Some leeway is needed to perform the function of assembling the state's case. *Weathers* v. *Ebert,* 505 F.2d 514 (4th Cir. 1974)."

Similarly, *Bruce* v. *Wade,* 537 F.2d 850 (5th Cir. 1976), held that seeking an indictment was initiation of a prosecution and thus within the shelter of *Imbler.*

Finally, in the most recent decision in the case of *Briggs* v. *Goodwin,* 569 F.2d 10 (D.C. Cir. 1977), *cert. denied* (1978), the Court, while finding lack of any prosecutorial function under the general fishing expedition circumstances of its case, at the same time recognized and reaffirmed the applicability of *Imbler* to a situation such as here when, after quoting this Court in *Imbler* at 431 n. 33, it stated:

> Although he passage quoted above makes it clear that a prosecutor's advocacy function does extend beyond the confines of the trial courtroom, the examples of such preliminary advocate activities provided by the *Supreme Court are instructive for their common focus on a particular criminal proceeding. By the plain import of the Court's remarks absolute immunity under Imbler extends only so far as necessary to protect a prosecutor's decision with respect to the initiation and conduct of particular cases. Imbler does not, in our reading, immunize prosecutors for any and all measures they may undertake in the course of wide-ranging law enforcement investigations or general fact-finding expeditions.* Id., at 19-20. (Emphasis added)

The Third Circuit Court of Appeals affirmance of Judge Lacey's decision is in complete conformity with this Court's instructions in *Imbler, supra,* and other circuits' recognition of same, whether explicit or implicit, concerning the common focus on a particular criminal proceeding as a delineating line between prosecutorial and purely investigative functions. It is precisely this lack of a specific focus on a particular criminal proceeding that motivated the Court in *Walker* v. *Cahalan,* 542 F.2d 681 (6th Cir. 1976) to hold that a prosecuting attorney was not immune for sending a damaging letter about plaintiff after an order of *nolle prosequi* had been entered on a murder charge against plaintiff and while no charges were currently pending. The Third Circuit implicitly reasoned similarly in *Helstoski* v. *Goldstein,* 552 F.2d 564 (3rd Cir. 1977).

In view of the foregoing, it is apparent that the Third Circuit Court of Appeals has decided this case in complete conformity with *Imbler, supra,* and with all court of appeals cases subsequent to *Imbler.*

Even though petitioner tries to create the illusion that there is a conflict among the circuits, the lack of merit to this contention is evident. A similar lack of merit taints petitioner's contention that this Court's decision in *Imbler*

needs clarification or that this Court needs to set the guidelines for determining the delineation of a prosecutor's prosecutorial, investigative, and administrative function.

It is also evident that, even if clarification were needed, this clarification would not be provided by this case because all of the alleged activities in question, under the circumstances of this case, are clearly an integral part of the quasi-judicial function of the prosecutor's office. For the same reasons, even if a writ of certiorari were to be granted, this Court would never reach the question which the petitioner presents in Point III, namely, whether the prosecuting attorney and his staff should be granted absolute immunity for actions taken by them while performing the administrative and investigative functions of their office. Thus, this question is purely hypothetical in the context of this case. E.g. *Muskrat* v. *United States*, 219 U.S. 346 (1911). No reason for the grant of certiorari is present therefor.

POINT II

A trial court's dismissal of a Complaint pursuant to Rule 12(b)(6) has long been approved by this Court and raises no exceptional issue for disposition.

In his fourth point petitioner contends that a trial judge may not dismiss a Complaint else the petitioner's right to due process will be denied. Petitioner's contention, in its essentials is an argument that a Complaint can only be dismissed after full discovery.

In *Helstoski, supra,* the Court indicated that that particular complaint should not have been dismissed without some discovery. Yet, neither that case nor any other case discovered by research has ever promulgated the general

rule that suits of this nature must proceed through discovery. Indeed, this Court itself in *Imbler* v. *Pachtman,* at 419, 425, recognized the need for the availability of an absolute immunity to defeat suits of this nature at the very outset.

On the face of the Complaint, as presented before the District Court, the alleged acts of the prosecutorial respondents in wiretapping, arresting and transporting and filing of the Complaint against plaintiff were obviously not clearly outside of the authority of jurisdiction of the prosecutor's office. The District Court in dismissing the allegations of this particular Complaint implicitly determined that under any circumstances, the petitioner herein was not entitled to any relief. No reason for the grant of certiorari is present therefor.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the instant petition for writ of certiorari be denied.

Respectfully submitted,

SILLS, BECK, CUMMIS, RADIN & TISCHMAN, P.A.,
Attorneys for Respondents Community State Bank and Trust Company, Thomas J. Bader, Peggy Fitz, Leo Kaplowitz, Lloyd Harris, Arthur R. Croucher, John C. Giordano, Jr., Seymour Goldberg, Theodore Ley, Joseph Resnick, Fred Rothschild, Sanford H. Salz, Max Sladowky, and Bernard Zients
By: MORTON S. BUNIS

MORTON S. BUNIS
Of Counsel

BOGDA M. BLEKICKI
On the Brief